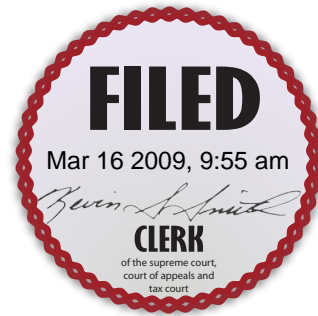


Pursuant to Ind.Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JEROME HERBERT,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0807-CR-405
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Charles A. Wiles, Senior Judge
Cause No. 49G04-0708-FA-177801

March 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jerome Herbert (“Herbert”) appeals his convictions for Kidnapping, a Class A felony,¹ Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony,² and two counts of Resisting Law Enforcement, one as a Class D felony and one as a Class A misdemeanor.³ We affirm the felony convictions but remand the case to the trial court with instructions to vacate the Class A misdemeanor conviction.⁴

Issues

Herbert raises four issues, of which we address the following two issues:⁵

- I. Whether he was deprived of his Sixth Amendment right of self-representation; and
- II. Whether he was subjected to double jeopardy when he was twice convicted for one instance of flight.

Facts and Procedural History

During the early morning hours of August 29, 2007, Corey Cotton (“Cotton”) drove to

¹ Ind. Code § 35-42-3-2.

² Ind. Code § 35-47-4-5.

³ Ind. Code § 35-44-3-3.

⁴ Herbert also purportedly appeals convictions for Criminal Confinement, Carjacking, Battery, Criminal Recklessness and Pointing a Firearm. However, the abstract of judgment indicates that Herbert was convicted of only four offenses. The trial court’s sentencing statement indicates that the trial court found that the additional offenses “merged” into the Kidnapping conviction and the trial court did not explicitly state that judgments of convictions were entered for those offenses. (Tr. 268.) Nevertheless, the trial court articulated sentences and the Chronological Case Summary indicates that judgments of conviction were entered. As the record is in conflict, we instruct the trial court to vacate convictions, if entered, for the “merged” offenses of Criminal Confinement, Carjacking, Battery, Criminal Recklessness and Pointing a Firearm. A trial court’s act of merging, without also vacating the conviction, is not sufficient to cure a double jeopardy violation. Green v. State, 856 N.E.2d 703, 704 (Ind. 2006).

⁵ We need not address his claim of insufficiency of the evidence to support a Criminal Reckless conviction, as Herbert does not stand convicted of this offense. See Fry v. State, 748 N.E.2d 369, 373 n.2 (Ind. 2001).

an Indianapolis gas station and went inside to purchase soft drinks. Realizing that he had no money with him, Cotton returned to his vehicle and placed the gearshift into reverse. Cotton saw the dome light illuminate and heard the passenger door close.

Cotton turned to see Herbert sitting in the passenger seat and holding a gun pointed at Cotton's side. Herbert directed Cotton to drive to an apartment complex off 42nd Street and stop by a dumpster. Herbert then ordered Cotton out of the vehicle, but Cotton instead attempted to push Herbert out. Herbert struck Cotton with a gun and fired a shot through an open window. As Cotton got out of the vehicle and began to run, he heard additional shots. Herbert drove away in Cotton's vehicle.

With the help of a passing motorist, Cotton summoned police assistance. Officers followed the stolen vehicle until Herbert crashed it into a tree near 75th Street and Shadeland Avenue. Herbert fled on foot, removing his pants and shirt as he fled. Pursuing officers recovered a shirt, pants, and a gun. The pants contained Herbert's driver's license and credit cards.

Approximately two hours after the initial chase, police officers apprehended Herbert, who was wearing only nylon shorts and shoes, at the intersection of 71st Street and Shadeland Avenue. Cotton identified Herbert as the person who took his vehicle.

On June 2, 2008, Herbert was brought to trial on charges of Kidnapping, Criminal Confinement, Carjacking, Unlawful Possession of a firearm by a Serious Violent Felon, Battery, Criminal Recklessness, Pointing a Firearm, and two counts of Resisting Law Enforcement. A jury found him guilty as charged. The trial court entered judgments of

conviction and sentenced Herbert as follows: 30 years for Kidnapping, 15 years for Unlawful Possession of a Firearm by a Serious Violent Felon, 1½ years for Resisting Law Enforcement as a Class D felony, and one year for Resisting Law Enforcement as a Class A misdemeanor. The sentences for the first two convictions were to be served consecutively, while the remaining sentences were to be served concurrently. Thus, Herbert’s aggregate sentence is 45 years.⁶ He now appeals.

Discussion and Decision

I. Self-Representation

Herbert argues that he was improperly denied the right to represent himself. A defendant’s Sixth Amendment right to counsel is essential to the fairness of a criminal proceeding. Drake v. State, 895 N.E.2d 389, 392 (Ind. Ct. App. 2008) (citing Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963)). Implicit in the right to counsel is the right to self-representation. Faretta v. California, 422 U.S. 806, 819 (1975).

A request to proceed pro se is a waiver of the right to counsel and thus there are several requirements to invoking the right of self-representation successfully. Stroud v. State, 809 N.E.2d 274, 279 (Ind. 2004). The request must be clear, unequivocal, and made within a reasonable time prior to trial. Id. Additionally, the choice to proceed pro se must be knowing, intelligent, and voluntary. Id. Even after a defendant has asserted his or her right

⁶ The trial court enunciated sentences for other offenses of which the jury found Herbert guilty, but implicitly indicated that judgments of conviction would not be entered for the other offenses because of “merger.” (Tr. 268.) The abstract of judgment indicates that judgments of conviction were entered on four

to self-representation, the right may be waived through conduct indicating that one is vacillating on the issue or has abandoned the request altogether. Id.

Approximately three weeks before his trial, Herbert filed a pro se motion, requesting the dismissal of his public defender and further requesting that he be allowed to proceed pro se. On May 20, 2008, a hearing was conducted on the motion. At the hearing, the following exchange took place:

Court: Mr. Herbert, do you have the money to hire private counsel?

Herbert: No, sir.

Court: Do you have family or friends that might hire a lawyer for you?

Herbert: No, sir.

Court: Are you capable of representing yourself, Mr. Herbert?

Herbert: I don't feel I know enough legal terms, you know, but I know a little. But I don't – no, I don't believe – okay.

(Tr. 275-76.) (emphasis added.) Herbert then catalogued several perceived deficiencies in his counsel's performance. The trial court advised Herbert as follows: "your options are to proceed with Mr. Manley or hire private counsel to represent you. You've acknowledged that you are not capable of representing yourself in trial." (Tr. 283.) Herbert was then advised that his trial was set for the second day of June.

counts: Kidnapping, Unlawful Possession of a Firearm by a Serious Violent Felon, and two counts of Resisting Law Enforcement. (App. 24.)

Herbert proceeded to trial with the assistance of appointed counsel. However, Herbert was dissatisfied with the manner in which his counsel conducted cross-examination of one of the State's witnesses and repeatedly stated "I want to go pro se." (Tr. 70.) Herbert further explained "I want to fire my public defender." (Tr. 70.) The jury was removed from the courtroom and the trial court inquired of Herbert whether or not he wanted to represent himself. Herbert responded: "Can I get more time to think about it" and then specified that he needed fifteen minutes. (Tr. 75.) The trial court granted Herbert's request for additional time and began to explain the disadvantages of self-representation. Herbert interrupted the trial court's colloquy to say: "No, I don't want to go pro se." (Tr. 77.) When the prosecutor indicated that he had not heard Herbert clearly, Herbert repeated: "No, I don't want to go pro se." (Tr. 77.)

In light of these circumstances, it was reasonable for the trial court to conclude that Herbert had abandoned his requests to represent himself. As such, Herbert was not deprived of his Sixth Amendment right of self-representation.

II. Double Jeopardy

Herbert contends that he was subjected to double jeopardy when he was convicted of two offenses for one continuous act of fleeing.

Recently, in Arthur v. State, 824 N.E.2d 383, 385 (Ind. Ct. App. 2005), trans. denied, a panel of this Court was asked to determine whether a defendant was subjected to double jeopardy when he was convicted of two counts of Resisting Law Enforcement after he had fled from officers, first in a vehicle, and then on foot. Arthur had crashed his truck into a

fence, exited the vehicle and fled on foot. See id. Challenging his multiple convictions on appeal, Arthur lodged a double jeopardy argument based on the federal constitution, which prohibits the imposition of two punishments for a single offense arising from one set of operative circumstances. Id. (citing Idle v. State, 587 N.E.2d 712, 715 (Ind. Ct. App. 1992), trans. denied). The Arthur Court observed that Indiana Code Section 35-44-3-3 proscribes an act of fleeing, regardless of whether it is accomplished on foot or in a vehicle, and further observed that Arthur had committed one continuous act of fleeing without interception. See id. at 387. Therefore, double jeopardy principles operated to preclude Arthur's conviction for the Class A misdemeanor count of Resisting Law Enforcement. See id.

The factual circumstances of Herbert's flight are indistinguishable from those in Arthur. Likewise, Herbert's second conviction for Resisting Law Enforcement must be vacated. We remand this case to the trial court with instructions to vacate the Class A misdemeanor conviction.

Conclusion

We affirm Herbert's convictions for Kidnapping, Unlawful Possession of a Firearm by a Serious Violent Felon, and Resisting Law Enforcement, as a Class D felony. We remand to the trial court with instructions to vacate the conviction for Resisting Law Enforcement, as a Class A misdemeanor.

Affirmed in part, reversed in part, and remanded.

MATHIAS, J., and BARNES, J., concur.